No. 435

ROBERT L. SICKMOND,

vs.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 435

ROBERT L. RICHMOND,

vs. *Petitioner,*

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent

PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert L. Richmond, respectfully prays for a rehearing of the order of this Court dated January 5, 1953, denying his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Basic Facts

This is an action under the Railway Labor Act, 45 U. S. C., Section 151 *et seq.*, for damages against the respondent railroad company for wrongful discharge in violation of the terms of a written contract of employment between the clerks and the railroad, as more fully shown in the petition for writ of certiorari, pages 2-11.

The United States Court of Appeals for the Fifth Circuit affirmed judgment of the District Court sustaining motion for summary judgment in favor of respondent (R. 75-79) holding that a compromise agreement executed in December, 1942 between petitioner and respondent in settlement of a suit then pending in a Louisiana State Court instituted by petitioner against respondent for his separate and independent claim for wages earned and unpaid at the time of his discharge under a Louisiana penal statute enacted to compel an employer to pay an employee within 24 hours after discharge operated as a discharge of petitioner's claim for damages for wrongful discharge in this action.

The written opinion of the Judge of the District Court (R. 46-58), and particularly the last paragraph on page 54, discloses that that Court erroneously took the view that petitioner had only a single cause of action against the respondent arising from his employment after his discharge and the termination of the contract, disregarding the decisions in *Elliott* v. *Miller,* 17 N. Y. S. 526, and *Viall* v. *Lionel Mfg. Co.,* 98 Atl. 329, reviewing and distinguishing the two causes of action, and holding that "the action for salary earned is not a bar to the action for damages for breach of contract", and the decision of *American China Development Co.* v. *Boyd,* 148 Fed. Rep. 258, which held that "Where a contract of employment was broken by plaintiff's discharge during the month of June, 1904, a judgment recovered by plaintiff for his salary for that month did not estop him from there after suing defendant for damages for breach of contract".

Petitioner urged in the Courts below, and alleged in his petition for writ of certiorari (P. 18-19), that the decision of the Court below was in direct conflict with the decision with the analogous case of *Burns* v. *Northern Pac. Ry.,* C. C. A. 8, 134 F. 2d 766, which held that "A receipt in full

of all claims and demands given as evidence of a settlement does not operate as a discharge of a claim which affirmatively appears not to have been included within the settlement as evidence of which the receipt was given".

Petitioner also alleged in his petition that the decision of the Court below was in direct conflict with the decision in the case of *Union Pac. Ry. Co.* v. *Artist,* C. C. A. 8, 60 Fed. Rep. 365 (P. 19), and the decision of this Court in the case of *Texas and Pac. Ry. Co.* v. *Dashiell,* 198 U. S. 521, which followed the decision in *Jackson* v. *Stackhouse,* 1 Cowden 122, 13 Am. Dec. 514, holding that "General words in a release are to be limited and restricted to the particular words in the recital". See Ann. Cas. 1912A, 498, reporting *Van Slyke* v. *Van Slyke,* 78 Atl. 179, for a review of authorities supporting the general rule, which clearly shows that the decision of the Court below has created a conflict in the decisions that have been observed since the beginning of American jurisprudence regarding the interpretation and effect of words of release following a particular recital.

In this petition for rehearing petitioner presents the question as to whether the Court below had jurisdiction and the power to hear and determine the motion for summary judgment, and to render the judgment sustaining the motion on the face of the record, and as presented under Question No. 4 in the petition (P. 13).

Question Presented No. 4 (P. 13) (Restated) is:

"Whether a Court may grant summary judgment for a defendant before answer is filed under Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., when the motion signed by the attorney for the defendant-movant was not in affidavit form, was not made on the attorney's personal knowledge, nor shown that the attorney possessed the knowledge asserted, and the purported supporting documents annexed to the motion were not in affidavit form as

required by the mandatory provisions of subdivision (e) of the Rule or is, as petitioner contends the motion a complete nullity".

Subdivision (e) of Rule 56 provides:

"(e) Form of Affidavit; Further Testimony.—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto, or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

The Judge of the District Court in ruling on the sufficiency of respondent's purported motion for summary judgment in his opinion said (R. 50—first paragraph): "*The motion to dismiss and for summary judgment is not supported by affidavit, but bears merely the certificate of counsel that copy had been mailed to plaintiff, who is his own lawyer of record.* However, the exhibits attached thereto are properly certified by the state judge and clerk and therefore may be considered for what they appear to be." (Emphasis by the writer.)

The record shows on its face that the certificate of the Clerk of the State Court (R. 20) only includes "the petition and motion to dismiss in suit No. 84,515, entitled *Robert L. Richmond* v. *St. Louis Southwestern Railway Company*, as same appears on the docket of the First Judicial District Court in and for Caddo Parish, Louisiana." The certificate is not verified under oath, and it makes no mention of the purported compromise agreement on which the Courts below based their decisions in granting summary judgment to respondent, and as shown by the record (R. 72-73) the

purported compromise agreement was not certified as a true copy, nor supported by affidavit, and in effect it was merely a copy of an unverified document added to respondent's purported motion for summary judgment by respondent's attorney. Accordingly, the Court was without jurisdiction and authority to consider the purported compromise agreement, or the State Court records in the determination of the motion for summary judgment.

An examination of respondent's purported motion for summary judgment (R. 9-21) discloses a total disregard of the requirements of Rule 56(e) in that the motion clearly and unmistakably shows on its face that it was not in affidavit form and that it was not intended by respondent to file the motion in affidavit form, and the purported motion contains no statement by the attorney who signed the paper that he possessed any personal knowledge of the averments in the purported motion.

The requirement that an oath be administered is inherent in the very definition of an affidavit, so that not only is the administration of an oath essential to the validity of the instrument but also it is essential to constitute the paper an affidavit. The requirements of an affidavit were stated in the case of *In Re Central Stamping & Mfg. Co.*, 77 F. Supp. 331, to be: "An affidavit is a statement or declaration reduced to writing and sworn to or affirmed before some officer who has authority to administer oath or affirmation; a statement of fact which is sworn to as the truth." To the same effect see *In re Beecher*, 50 F. Supp. 530. Other pertinent decisions are: No statement which is not properly sworn to constitutes an "affidavit". *Federal Chemical Co.* v. *Farmers Produce Exchange*, 118 S. W. 2d 1067. Purported affidavit is mere statement, unless properly sworn to. *E. L. Witt & Sons et al.* v. *Stith*, 265 S. W. 1076. A purported affidavit is nugatory unless oath is administered by

authorized official. *Zimmerman* v. *Industrial Commission, et al.*, 120 P. 2d 636.

The respondent's purported motion for summary judgment (R. 9-21) shows conclusively on its face that it does not meet the requirements of an affidavit, nor was it supported by affidavits, and, accordingly, the purported motion was nugatory, and formed no part of the record proper.

The Court of Appeals did not discuss the sufficiency or validity of respondent's motion for summary judgment in its opinion affirming the judgment of the District Court (R. 76-79).

Rule 56 of the Federal Rules of Civil Procedure is not merely directory but affects the substantial rights of the litigants and since it provides a somewhat drastic remedy it must be used with a due regard for its purposes, and a cautious observance of its requirements in order that no person will be deprived of a trial of disputed factual issues. The rule requires that there must be a strict compliance with the prerequisites to establish the Court's power to render summary judgment, otherwise the rule may be easily nullified, and since respondent's purported motion for summary judgment was not in affidavit form, nor supported by an affidavit made on personal knowledge by an affiant, as required by the mandatory provisions of Rule 56, the failure to comply with the requirements of the Rule was fatal to the respondent's motion, as the Court was without power or jurisdiction to entertain the motion, or to render the judgment for the reason that the proper affidavit was not made. To hold otherwise would set a precedent that would breed confusion and uncertainty and encourage laxity in complying with the vital steps in filing a motion for summary judgment.

In *Thatcher* v. *Powell*, 19 U. S. 119, 6 Wheat 119, 5 L. Ed. 221, this Court spoke on an analogous subject as follows:

"In Summary proceedings, where a court exercises an extraordinary power, under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction, ought to appear on the face of the record; otherwise, the proceedings are not merely voidable, but absolutely void, as being coram non judice."

The Court of Appeals for the Eighth Circuit in the case of *Parmelee* v. *Chicago Eye Shield Co.*, 157 F. 2d 582, stated: "The summary judgment procedure is a drastic remedy and federal rules relating to summary judgment must be strictly complied with." Other pertinent decisions are: "The Federal Rules of Civil Procedure have the same force and effect as statutory enactments of Congress. Federal rules regarding admission of facts and genuineness of documents, and providing for summary judgment, are not merely directory but affect substantial rights of litigants. Mandatory rules for trial courts promulgated under express direction of Legislature cannot be waived by a party even with consent of court, but under certain circumstances party may consent to suspension of rule and waive benefit thereof. *United States* v. *Brandt, et al.*, 8 F. R. D. 163. Courts are without authority to nullify requirements of federal rule providing manner in which jurisdiction can be acquired. *Blanc* v. *Young*, 10 F. R. D. 109.

In the case of *Dowling* v. *Isthmian S. S. Corp.*, C. A. Pa., 184 F. 2d 758, certiorari denied 71 S. Ct. 493, 340 U. S. 935, 95 L. Ed. 675, it was held: "Court rules, including rules of practice prescribed by Supreme Court for inferior tribunals, as well as rules made by lower courts for their own guidance under statutory authority, cannot enlarge or restrict courts' jurisdiction nor abrogate or modify substantive law."

It was held in the case of *Joy et al.* v. *Hague et al.*, C. C. A. 1, 175 F. 2d 395, that "It is duty of court, if it finds that

jurisdiction does not exist, to proceed no further, but to dismiss the suit."

This Court in the case of *In The Matter of the National Labor Relations Board,* 304 U. S. 486, at page 494 said: "Jurisdiction as the term is to be applied in this instance, is the power to hear and determine the controversy presented, in a given set of circumstances. A court has jurisdiction, in another use of the term, to examine the question whether that power is conferred upon it in the circumstances disclosed, but if it finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith." • • • See also, *Hartford Life Ins. Co.* v. *Johnson,* C. C. A. 8, 268 Fed. Rep. 30, at page 34, which said "It is the power to hear and determine the subject matter in controversy which constitutes jurisdiction." (See also authorities cited.)

In the case of *Saul* v. *Saul,* App. D. C., 122 F. 2d 64, 74 App. D. C. 287, the Court held: "Total lack of power in a court to deal with the subject matter presented to it in a particular suit goes not merely to protection of the parties in securing a fair hearing, but to the authority of the court itself."

It was held in the case of *Quereau* v. *Lehigh Valley R. Co.,* 251 Fed. Rep. 251, that "An act done or an order made by the presiding judge or court in the course of a trial is void, if the court or judge had no jurisdiction to do that particular thing or make that particular order, even though it had jurisdiction of the parties and the case."

Petitioner alleged in his petition (P. 19) that the decision of the Court below was in direct conflict with the decision of the Court of Appeals, D. C., in the case of *Jameson* v. *Jameson,* 176 F. 2d 58, in which the Court held: "Shall", within subsection (e) of this rule, providing that affidavits filed in support of or opposing summary judgment "shall"

be made on personal knowledge, is mandatory and requires that an affidavit state matters personally known to affiant."

The same holding was observed in the cases of *Person* v. *United States*, C. C. A. 8, 112 F. 2d 1, certiorari denied 61 S. Ct. 35, 311 U. S. 672, 85 L. Ed. 432; *Walling* v. *Fairmount Creamery Co.*, C. C. A. 8, 139 F. 2d 318; and, *Sprague* v. *Vogt et al.*, C. C. A. 8, 150 F. 2d 795.

Since respondent ignored entirely the mandatory requirements of Rule 56(e) by not filing an affidavit in this case the decision of the Court below in sustaining respondent's invalid motion for summary judgment is clearly in conflict with the above quoted decisions of the other Circuit Courts of Appeals.

Petitioner alleged in his petition (P. 20) that the decision of the Court below was in direct conflict with the decision of the Court of U. S. Appeals, D. C. in the case of *Wittlin* v. *Giacalone*, 154 F. 2d 20, 81 U. S. App. D. C. 20, in which it was held: "Where motion for summary judgment was not in affidavit form, the motion was not properly to be weighed, as far as its factual statements were concerned, in determining whether summary judgment should be granted." This case also held that "The courts are critical of papers presented by party moving for summary judgment but not of the opposing papers."

The above quoted decision is in point with the instant case, and since the Court of Appeals for the Fifth Circuit reached an opposite result on the same question by sustaining respondent's unverified motion for summary judgment there is clearly an unmistakable conflict between the two Courts of Appeals.

Petitioner also alleged in his petition (P. 21) that the decision of the Court below was in direct conflict with the decision of this Court in the case of *Automatic Radio Mfg.*

Co. v. *Hazeltine Research*, 339 U. S. 827, 70 S. Ct. 894, 94 L. Ed. 1312, in which it was held:

"Where attorney's affidavit in support of motion for summary judgment was made upon information and belief and relevant portion thereof did not comply with subdivision (e) of this rule, United States Supreme Court would disregard averment in the motion as not supported by record."

Petitioner's case is much more favorable than the above quoted case for the reason that respondent's attorney filed no affidavit at all in the instant case, and disregarded the requirements of subdivision (e) entirely, and since the Court of Appeals for the Fifth Circuit reached an opposite result on the same question in sustaining respondent's invalid motion for summary judgment there is clearly a conflict with the decision of this Court.

The record and proceedings in this case unmistakably show that the trial Court was without power or jurisdiction to entertain the purported motion for summary judgment, or to render the judgment thereon, because of the failure of the respondent to comply with the mandatory provisions of Rule 56 in presenting the motion, and the public importance for granting a writ of certiorari is reflected in the numerous conflicts that the decision of the Court of Appeals for the Fifth Circuit has created with decisions of other Circuit Courts of Appeals, and with the decisions of this Court, on the same questions.

Conclusion

For the foregoing reasons, petitioner respectfully prays that the order of this Court denying his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be reheard and vacated and that the petition be granted.

Robert L. Richmond,
Petitioner, pro se.

Certificate of Petitioner

STATE OF TEXAS,
County of Tarrant, ss:

Robert L. Richmond, being first duly sworn, deposes and says, that he is the petitioner in the above and foregoing petition, and that he hereby certifies that the foregoing petition for rehearing filed in this cause is presented in good faith, and that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 33 as amended, and that said petition for rehearing is not interposed for delay.

ROBERT L. RICHMOND.

Sworn to and subscribed before me this 13th day of January, 1953.

QUINNIE FAE PACE,
[SEAL.] *Notary Public, Tarrant County, Texas.*

My Commission Expires 6-1, 1953.